Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

SUPPLEMENTAL WHITE PAPER ON ISP RECIPROCAL COMPENSATION

The purpose of this supplemental submission is to elaborate on four related issues of statutory construction touched on in the white paper submitted by Verizon and BellSouth on May 14, 2004.

First, as shown in our previous white paper, only traffic that originates on the network of one local exchange carrier ("LEC") and terminates on the network of an interconnecting LEC is subject to the reciprocal compensation obligation imposed by section 251(b)(5). Here, of course, the Internet-bound calls at issue do not terminate on the network of the interconnecting local exchange carrier, but continue on to distant websites. Nevertheless, some parties have argued that, because there is an information service involved for part of the communication, the calls should be treated as two separate communications for purposes of 251(b)(5), the first of which is a "telecommunications service" that terminates at the ISP's location, and the second of which is an information service. That argument is foreclosed by the terms of the 1996 Act. Under section 251(b)(5), the relevant question is where the underlying "telecommunications" originates and terminates, and there is no question that the "telecommunications" involved continues on beyond the ISP's location to distant websites across the country and around the world. The fact that an

information service may ride on top of that telecommunications for some part of its end-to-end journey does nothing to change that fact. Accordingly, as this Commission has repeatedly concluded, Internet communications involve a continuous stream of interstate communications between the end user and the ultimate destination of the communication. Such calls accordingly do not "terminate" at the ISP's premises for purposes of §§ 251(b)(5) and 252(d)(2).

Second, as we previously explained, the express terms of §§ 251(b)(5) and 252(d)(2) make clear that the reciprocal compensation obligation applies only to traffic that *terminates* on the network of an interconnecting local exchange carrier. Some parties nevertheless argue that the Act's reciprocal compensation obligation should be extended to require payment to intermediaries through which Internet-bound calls are routed, but which admittedly do not "terminate" the calls, on the theory that they are providing "transport." But the Act's reciprocal compensation obligation applies only for "transport *and termination*" of calls, as a means of recovering the costs of "terminating" the calls. Moreover, the contrary conclusion urged by some parties would produce absurd results, creating an obligation to pay reciprocal compensation to a potentially unlimited series of intermediaries who interpose themselves for any part of a call's path, no matter how limited. This would only further expand the opportunities for uneconomic arbitrage that this Commission wisely has sought to end.

Third, while the D.C. Circuit questioned the Commission's failure to decide whether Internet-bound traffic constitutes "exchange access" or "telephone exchange service" in one of its prior Internet-bound traffic orders, the court has never reviewed on the merits – let alone invalidated – the Commission's conclusion in a parallel proceeding that this traffic is a form of "exchange access." On the contrary, the court went out of its way to emphasize that any determination made by the Commission in that respect would be afforded deference. Because

the Commission's previous conclusion that Internet-bound traffic is a form of exchange access is eminently reasonable, it would be sustained. Even if ISP-bound traffic did not qualify as exchange access, however, it is not "telephone exchange service" but instead is a third category of interstate calls over which the Commission has jurisdiction.

Fourth, some parties have argued that the Commission should read § 251(b)(5) to apply to ISP-bound traffic in order to lay the groundwork to later read that provision to apply to *all* traffic, including both interstate and intrastate exchange access traffic, and to then mandate bill and keep for all exchange access traffic. But reading § 251(b)(5) to apply to the traffic at issue here would not give the Commission any greater ability to mandate bill-and-keep for intrastate exchange access traffic. On the contrary, any attempt to extend the reach of § 251(b)(5) to all exchange access traffic would conflict with the Act, and would not be sustainable. As we demonstrated in our previous white paper, the terms of the Act do not permit classification of exchange access traffic as subject to § 251(b)(5), among other reasons, because the obligation of § 251(b)(5) applies only to traffic exchanged between interconnecting LECs, not to traffic exchanged with IXCs and not to traffic that does not terminate on the interconnecting carrier's network, as interexchange traffic typically does not. Moreover, while the better reading of § 252(d)(2) would permit the Commission to order bill-and-keep for ISP-bound traffic given the unique characteristics of this traffic, this is still an open question. Attempting to go even further and apply bill-and-keep to all traffic, including all exchange access traffic, may well exceed the bounds outlined in our previous paper as to when bill-and-keep can be imposed under this provision consistent with the terms of the Act. Expanding the scope of § 251(b)(5) to reach ISP-bound traffic (or other types of interstate traffic such as interstate exchange access) thus could

have the perverse effect of expanding the authority of state commissions' rate-setting authority to encompass *interstate* access traffic, thereby stripping the FCC of a core regulatory power.

I. AN ISP-BOUND COMMUNICATION IS A SINGLE "CALL" THAT DOES NOT TERMINATE WITHIN THE LOCAL EXCHANGE

In 1999, the Commission squarely rejected the argument that a call to the Internet "terminates" at the ISP's point of presence. *See ISP Declaratory Ruling*,[1] 14 FCC Rcd at 3697, ¶ 12. Despite that holding, certain parties continue to argue the "two-call" theory: they insist that Internet-bound communications actually involve *two* communications – one between the caller and the ISP, and a second between the ISP and the distant website. According to these arguments, because ISPs provide an information service, rather than a telecommunications service, the telecommunications service component of the Internet-bound call ends at the ISP; a separate information service begins from that point. This argument ignores the language of the statute and decades of precedent.

Section 251(b)(5) applies to transport and termination of "telecommunications" – it makes no mention of a telecommunications *service*. So the relevant question is where the underlying "telecommunications" originates and terminates. This is significant here because an information service must, by definition, be provided "via telecommunications." And here, the underlying "telecommunications" on which the information service rides unquestionably continues on to distant websites. The Commission has recognized over a course of decisions stretching back two decades that calls that transit an enhanced service provider's local point of

[1] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*"), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

presence do not "terminate" but continue on to distant points beyond the local exchange.[2] As a result, a local exchange carrier delivering an ISP-bound call to an ISP's premises does not "terminate" telecommunications, because, by their very nature, ISP-bound calls involve continuous interstate telecommunications between the end user and points outside the local exchange.

The fact that ISPs provide an information service, not a telecommunications service, does not alter this analysis. As the Commission recognized in the *ISP Declaratory Ruling*, "information services," by definition, are provided "'via telecommunications.'" 14 FCC Rcd at 3699, ¶ 13 (quoting 47 U.S.C. § 153(20)). In its *Advanced Services Remand Order*,[3] the Commission described the manner in which ISPs "acquire telecommunications" in order to "provide those components of Internet access services that involve information transport." *Advanced Services Remand Order*, 15 FCC Rcd at 401, ¶ 34. "Thus, the information service is provisioned by the ISP 'via telecommunications,' including interexchange telecommunications, although the Internet service itself is an 'information service' . . . rather than a telecommunications service." *Id.* Put another way, "the access provided to the ISP by the local exchange carrier facilitates the delivery of an information service because of the 'applications that ride on top' of the telecommunications service." *Id.* at 403, ¶ 37.

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[2] *See*, *e.g.*, Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711, ¶ 78 (1983) ("*Access Charge Reconsideration Order*"); Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4306, ¶ 7 (1987) ("*Enhanced Services NPRM*"); Memorandum Opinion and Order, *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22476, ¶ 19 (1998) ("*GTE Tariff Order*").

[3] Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) ("*Advanced Services Remand Order*"), *vacated*, *WorldCom, Inc. v. FCC*, 246 F.3d 690 (2001).

This analysis is correct. For a subscriber to receive information from Internet websites located in distant exchanges, there must be a continuous stream of telecommunications establishing a communications link between the subscriber and the distant website. Because the information is transmitted from a distant website to the end user, it cannot be the case that telecommunications "terminate" at the premises of the ISP.

The language of § 252(d)(2) confirms this point. That section provides that, "[f]or purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)," reciprocal compensation terms and conditions must provide for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of *calls* that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2) (emphasis added). Because this provision governs "compliance . . . with § 251(b)(5)," it is reasonable to construe the undefined term "calls" in that provision as meaning the same thing as the "telecommunications" that are subject to reciprocal compensation under § 251(b)(5). And the FCC has repeatedly held – and Congress would have understood – that ISP-bound calls do not terminate at the premises of an ISP. To the contrary, the FCC held long before the 1996 Act was passed that information service providers "may use incumbent LEC facilities to originate and terminate interstate *calls*" – *i.e.*, any transmission from a distant exchange. *See Access Charge Reform Order*,[4] 12 FCC Rcd at 16131-32, ¶ 341 (describing *Access Charge Reconsideration Order* and *ESP Exemption Order*); *see also GTE Tariff Order*, 13 FCC Rcd at 22475, ¶ 17 (noting FCC's prior holding in *Memory Call* that "an incoming

[4] First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 (1997), *petitions for review denied*, 153 F.3d 523 (8th Cir. 1998) ("*Access Charge Reform Order*").

interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus" constituted "one interstate call").

Furthermore, as we addressed at greater length in our previous white paper, the Commission has made clear repeatedly that its end-to-end analysis of the *jurisdictional* nature of traffic – which does not distinguish between telecommunications services and information services – is likewise controlling for purposes of inter-carrier *compensation*. Thus, to cite one pertinent example, the Commission rejected one defendant's "attempt to distinguish the so-called 'jurisdictional' nature of a call from its status for 'billing' purposes," holding that there was "no persuasive argument nor any authority to support their contention that this distinction has any legal significance."[5] The ESP exemption itself provides strong support for the proposition that, in principle, all interstate calls – whether characterized as information services or telecommunications services – are potentially subject to access charges when they make use of the local exchange for the initiation or termination of interstate communications. If calls "terminated" at the ESP, there would be no basis for the imposition of any *access* charges on ESPs, and, correspondingly, no need for an exemption. And, of course, the Commission repeatedly has held that the exception is necessary precisely because access charges otherwise would apply.

Accordingly, the determination that ISP-bound calls do not "terminate" at the premises of the ISP for purposes of §§ 251(b)(5) and 252(d)(2) is entirely consistent with the underlying character of the communications, the statutory text, and the regulatory context.

[5] Order on Reconsideration, *Teleconnect Co. v. Bell Tel. Co.*, 10 FCC Rcd 1626, 1629-30, ¶ 12 (1995).

II. SECTIONS 251(b)(5) AND 252(d)(2) DO NOT AUTHORIZE RECIPROCAL COMPENSATION FOR CARRIERS THAT MERELY "TRANSPORT" BUT DO NOT "TERMINATE" CALLS

Other parties, while continuing to argue that ISP-bound calls are subject to reciprocal compensation, have abandoned the claim that ISP-bound calls terminate at the ISP. Instead, they argue that, when an ILEC's customer initiates a call that is passed to a CLEC for delivery to an ISP, the CLEC may claim "reciprocal compensation" for merely transporting, but not terminating, the call. *See, e.g.*, Ex Parte Letter from David L. Lawson, counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, attachment (FCC filed May 28, 2004). That claim is inconsistent with the statutory language and leads to absurd results.

First, as shown in our previous white paper, both § 251(b)(5) and § 252(d)(2) make clear that reciprocal compensation applies *only* to calls that originate on the network of one interconnecting local exchange carrier and *terminate* on the network of a second. Section 251(b)(5) requires local exchange carriers to enter into "reciprocal compensation arrangements for the transport *and termination* of telecommunications." 47 U.S.C. § 251(b)(5). Congress phrased § 251(b)(5) in the conjunctive, not the disjunctive, to make clear that the obligation applies only to local carriers that *terminate*, and not to carriers that merely transport, traffic. Section 252(d)(2)(A)(i) repeats the phrase, requiring the Commission to structure compensation to ensure recovery of "costs associated with the transport *and termination* . . . of calls that originate on the network facilities of the other carrier." *Id.* § 252(d)(2)(A)(i). This pricing standard does not apply to a carrier that transports but does *not* terminate calls that originate on the network facilities of the other carrier. And § 252(d)(2)(A)(ii) provides that such costs shall be determined "on the basis of a reasonable approximation of the additional costs of *terminating* such calls." *Id.* § 252(d)(2)(A)(ii). Had Congress intended its reciprocal compensation

obligation to apply to transport alone, it would not have established its pricing standard for reciprocal compensation in terms of the costs of terminating calls.

Furthermore, if a carrier could claim reciprocal compensation merely for transporting traffic that it did not terminate, the possibilities for regulatory arbitrage could be endless. For example, rather than interconnect directly, a CLEC might instead insist that the ILEC route traffic through a third-party CLEC – or even through multiple CLECs – with all CLECs claiming compensation – one for "termination" and the rest for "transport." Congress could not have intended to authorize compensation for carriers that uselessly interpose themselves in the path of a call, yet, reading § 251(b)(5) to require payment of reciprocal compensation for "transport" leads to precisely that result.[6]

III. ISP-BOUND CALLS CONSTITUTE "EXCHANGE ACCESS" AND, IN ANY EVENT, ARE NOT "TELEPHONE EXCHANGE SERVICE"

In *Bell Atlantic*, the D.C. Circuit questioned the Commission's failure to address arguments that ISP-bound traffic is "telephone exchange service," not "exchange access" under the Act. Subsequently, in the *Advanced Services Remand Order*, the FCC held that ISP-bound traffic qualifies as "exchange access." The court never reviewed that determination on the merits; however, it has held that "[t]he statute appears ambiguous as to whether calls to ISPs fit within 'exchange access' or telephone exchange service,' and on that view any agency interpretation would be subject to judicial deference." *Bell Atlantic Tel. Co.*, 206 F.3d at 9. In fact, the Commission's prior conclusion was correct, its reasoning on the point will easily withstand review, and the Commission should reaffirm it. And, even if the Commission were to

[6] ILECs must be compensated for providing transit service – transporting calls between non-interconnected local carriers and CMRS providers as a service to those carriers – but such compensation is not pursuant to section 251(b)(5).

decide otherwise, ISP-bound traffic is not "telephone exchange service," but instead would be a third category of interstate calls over which this Commission has jurisdiction.

A. ISP-Bound Calls Are "Exchange Access"

"Exchange access" is defined in the Act as "the offering of [1] access to telephone exchange services or facilities [2] for the purposes of the origination and termination of telephone toll services." 47 U.S.C. § 153(16). "Telephone toll service," in turn, is defined as "telephone service between stations in different exchanges for which there is made a separate charge." *Id.* § 153(48). As the Commission previously correctly concluded, ISP-bound traffic satisfies both the letter and the spirit of this definition.

In its *Advanced Services Remand Order*, the Commission held that the "access service provided by the local exchange carrier is for the 'origination and termination of telephone toll service' within the meaning of the statutory definition" because that service "enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange," using both the LEC's services and, typically, "the telephone toll service of the telecommunications carrier responsible for the interexchange transport." 15 FCC Rcd at 402, ¶¶ 35-36. The Commission further found "that the IXC that provides the interexchange telecommunications to the ISP charges the ISP for those telecommunications and that charge is separate from the exchange service charge that the ISP or end user pays to the LEC." *Id.* at 402, ¶ 36.

On review, the D.C. Circuit vacated and remanded the order – without addressing the merits of the Commission's decision – simply because it had relied on the conclusion, reached earlier in the *ISP Declaratory Ruling*, that ISP-bound traffic does not terminate at the ISP. That conclusion had been vacated *before* the Court reviewed the *Advanced Services Remand Order*,

and the Commission did not "seriously contest" that its order should be remanded to consider that intervening development. *See WorldCom*, 246 F.3d at 696. But the Commission's analysis in that order remains fundamentally sound.

There is, of course, no dispute that ISPs purchase "access to telephone exchange services or facilities." Furthermore, the "information services" that ISPs sell to their subscribers must include transmission of information from distant exchanges to effectuate the communication between the end-user subscriber located in one exchange and the sources of information located across the country and around the globe. *See Advanced Services Remand Order*, 15 FCC Rcd at 401, ¶ 34 (describing the "information transport" "components" of Internet access services). The Commission has already determined that such transmissions qualify as "telephone service," a term which is not limited to service between telephones but includes "any device used by an end-user to receive and terminate telecommunications." *Id*. at 404, ¶ 40. Nor is "telephone service" "limited to voice communications" but instead includes "origination and termination of interstate data communications." *Id.* at 404, ¶ 41. ISPs commonly purchase such interexchange transmission capacity from IXCs – thus the "separate charge" requirement of the definition of telephone toll service is likewise met. *Id*. at 402, ¶ 36. Therefore, the access services that a local exchange carrier provides in handling ISP-bound calls are "for the purposes of origination of telephone toll services." 47 U.S.C. § 153(16).

The Commission's ruling in the *InterLATA Services Order*[7] reinforces this analysis. The Act defines "interLATA service" as "*telecommunications* between a point located in a local access and transport area and a point located outside such area." *Id*. § 153(21) (emphasis added).

[7] Order on Remand, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 FCC Rcd 9751 (2001) ("*InterLATA Services Order*").

Some BOCs argued that a BOC could not be "providing an interLATA service when it offer[ed] an information service that is transmitted across LATA boundaries" because "an information service which bundles or 'uses' interLATA telecommunications cannot also be deemed to be providing an interLATA service" – *i.e.*, telecommunications. *InterLATA Services Order*, 16 FCC Rcd at 9756, ¶ 11; *see also id.* at 9758, ¶ 15. The Commission rejected that argument. Instead, the Commission concluded that when a BOC provides an information service that includes an interLATA telecommunications component, it is "providing" an interLATA service, *i.e.*, interLATA telecommunications, "even when it is not *separately* providing telecommunications to its subscribers." *Id.* at 9759, ¶ 17; *see also id.* at 9752, ¶ 2 ("interLATA services" "encompasses interLATA information services as well as interLATA telecommunications services"). The same analysis applies in the case of any ISP: ISPs use telephone toll services to provide information services.

This conclusion does not affect the Commission's long-standing determination that information services are not common carrier services for purposes of Title II. ISPs are not common carriers because they are not *separately* providing telecommunications to their subscribers. This analysis therefore would have no consequences for the Commission's preemptive policy of leaving information services unregulated. But ISPs do use their access to the local exchange for the purpose of originating and terminating telephone toll services, and therefore are "exchange access" users.

Furthermore, the determination that ISP-bound calls constitute "exchange access" is fully consistent with treatment of the term "exchange access" under prior Commission decisions. For example, in the *Access Charge Reconsideration Order* – in which the Commission first adopted the ESP exemption – the Commission made clear that "[a]mong the variety of users of access

service are . . . enhanced service providers," which "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing *interstate calls*." 97 F.C.C.2d at 711, ¶ 78. The Commission further clarified that all such service providers are "users of exchange access." *Id.* at 712, ¶ 80. In subsequent orders, the Commission has repeatedly characterized "enhanced service providers" as "users of exchange access." *Enhanced Services NPRM*, 2 FCC Rcd at 4305, ¶ 1. Congress would have been aware that the FCC had repeatedly classified this traffic as a form of "exchange access," and it did nothing to alter that classification. Characterizing ISP-bound calls as "exchange access" under the Act is thus fully consistent with that course of precedent, while excluding such calls from that definition would represent a sharp break from those prior decisions.

B. ISP-Bound Calls Are Not "Telephone Exchange Service"

Even if ISP-bound calls did not constitute "exchange access," they would not fit within the Act's definition of "telephone exchange service" either.[8] The statutory definition of "telephone exchange service" is intended to define a narrow class of purely local traffic *over which the Commission has no jurisdiction, even in cases where it is technically interstate.* Thus, § 221(b) of the Act provides that "nothing in [the Act] shall be construed to apply, or give the

[8] In *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the D.C. Circuit left open the question "whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' . . . or neither, or whether those terms cover the universe to which such calls might belong." *Id*. at 434. The Commission has not articulated a clear position in this regard. *Compare Advanced Services Remand Order*, 15 FCC Rcd at 407, ¶ 46 ("we decline to find that information access services are a separate category of services, distinct from, and mutually exclusive with, telephone exchange services or exchange access services") *with* Order on Remand and Report Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9171, ¶ 44 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429, *cert. denied*, 538 U.S. 1012 (2003) ("We conclude that . . . 'information access' was meant to include all access traffic that was routed by a LEC 'to or from' providers of information services.").

Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . *telephone exchange service* . . . *even though a portion of such exchange service constitute interstate or foreign communications.*" 47 U.S.C. § 221(b) (emphasis added). If the Commission rules that ISP-bound calls constitute telephone exchange service, it would lose jurisdiction over Internet access entirely.

Moreover, the Commission would not merely risk losing jurisdiction over dial-up Internet access, it would risk losing jurisdiction over broadband as well. As with dial-up Internet access, the first leg of a broadband connection is a communications link between the subscriber and the ISP. If a dial-up connection constitutes telephone exchange service – despite the continuation of communications into distant exchanges – a broadband connection would likely constitute telephone exchange service as well (at least so long as the Commission continues to classify broadband services as "telecommunications services"). And, therefore, the Commission arguably might be denied jurisdiction over those broadband services under § 221(b).

Thus, the only conclusion consistent with the Commission's long-standing assertion of jurisdiction over interstate information services traffic is that "telephone exchange service" is narrowly limited to those services that remain wholly within an exchange (or a single local calling area's interconnected series of exchanges). This is what the Commission already held in the *Advanced Services Remand Order*. It found that the "primary distinction" between telephone exchange service and exchange access is that, "while telephone exchange services permit communication 'within a telephone exchange' or 'within a connected system of telephone exchanges within the same exchange area,' exchange access refers to access to telephone exchange services or facilities for the purposes of originating or terminating communications that travel outside an exchange." 15 FCC Rcd at 391, ¶ 15 (footnote omitted). The Commission

further concluded that, because "typically ISP-bound traffic does not originate and terminate within an exchange," such traffic "does not constitute telephone exchange service within the meaning of the Act." *Id.* at 392, ¶ 16.

The Commission's interpretation is particularly persuasive in light of the statutory history. The current definition of "telephone exchange service" is derived from the definition in the 1934 Act.[9] Congress had no notion in 1934 of any distinction between telecommunications service and information service. Therefore, it is reasonable to understand the word "service" in the phrase "service within a telephone exchange" to refer to any communications service provided over the telephone network. To the extent that such a service is not provided wholly "within a telephone exchange," it does not qualify as telephone exchange service. And because ISP-bound calls *do* involve a communications service that travels beyond the limits of the local exchange, the provision of access services to ISPs cannot be considered "telephone exchange service."

C. If ISP-Bound Traffic Is Not "Exchange Access," It Is Nevertheless Interstate Traffic Subject to the Commission's Jurisdiction Under § 201

If the Commission were to hold – incorrectly – that ISP-bound traffic is not "exchange access," the Commission should nevertheless affirm that such traffic is interstate traffic that is not telephone exchange service and over which the Commission therefore has jurisdiction. The

[9] The original definition was "[1] service within a telephone exchange, *or* [2] within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, *and* [3] which is covered by the exchange service charge." *See* 47 U.S.C.A. § 153, historical and statutory notes (emphasis added). The 1996 Act amended this definition to make it technology neutral, by clarifying that the definition encompasses a "comparable service" – *i.e.*, a service that is wholly "within a telephone exchange" or "connected system of telephone exchanges" and "covered by the exchange service charge" – that is "provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47).

Commission's assertion of jurisdiction over this traffic is of long standing. Furthermore, the D.C. Circuit, in *Bell Atlantic*, did not question the validity of the Commission's assertion of jurisdiction over ISP-bound traffic based on its end-to-end nature. Pursuant to § 201, the Commission has jurisdiction to regulate interstate traffic that is not telephone exchange service, and that authority is expressly preserved in § 251(i).

If the Commission were to hold that ISP-bound traffic is some "third thing" – interstate traffic that is neither exchange access nor telephone exchange service – that does not mean that the Commission would be without authority to ensure that carriers continue to interconnect and exchange this type of traffic. While § 251(c)(2)(A) may apply only to interconnection for "the transmission and routing of telephone exchange service and exchange access," that obviously is not the only provision in the Act addressing interconnection. For example, § 251(a) imposes a general duty on all carriers to interconnect, and § 201 gives the Commission general rulemaking authority to address the exchange of interstate traffic.

IV. CLASSIFYING ALL TELECOMMUNICATIONS TRAFFIC AS SUBJECT TO § 251(b)(5) CANNOT BE SUSTAINED ON REVIEW AND WOULD RESTRICT COMMISSION AUTHORITY

It has been suggested that the Commission should read § 251(b)(5) to mandate reciprocal compensation arrangements for the exchange of all traffic to facilitate the Commission's adoption of bill-and-keep arrangements for all telecommunications traffic, including intrastate exchange access traffic. *See, e.g.*, Ex Parte Letter of Charles D. Breckinridge, counsel to Level 3, to Marlene H. Dortch, Secretary, FCC, attachment (FCC filed June 23, 2004). But § 251(b)(5) lawfully cannot be read to apply to long-distance traffic. And even attempting such a distorted reading of the statute would risk surrendering, not expanding, the Commission's regulatory control over intercarrier compensation generally and over interstate and Internet traffic in particular.

We previously catalogued at length the various reasons that §§ 251(b)(5) and 252(d)(2) can only be read to apply to traffic that originates on the network facilities of one local exchange carrier and terminates on the network facilities of an interconnecting local exchange carrier within the same local calling area. *See* White Paper at 26-31. While we will not repeat that entire discussion here, the salient points can be briefly summarized for present purposes as follows:

- *First*, the express terms of the Act make clear that reciprocal compensation applies only to traffic that *terminates* on the network of an interconnecting local exchange carrier and that excludes long-distance traffic, which does not terminate on the LEC network.

- *Second*, historical background and the legislative history reinforce the conclusion that § 251(b)(5) is limited to local telecommunications: reciprocal compensation was intended to fill a gap by addressing compensation for calls exchanged between competing local carriers in the same calling area; Congress intended to leave intact the compensation regime for long-distance calls, which was already well established.

- *Third*, the reciprocal compensation obligation imposed by § 251(b)(5) applies to "[e]ach *local* exchange carrier"; it would be unworkable to read that provision as applying to traffic that LECs exchange with IXCs, because IXCs have no obligation under that provision to agree to pay LECs for the termination of traffic.

- *Fourth*, § 251(g) further emphasizes that Congress did not intend reciprocal compensation to displace the existing access regime – to the contrary, given the care that Congress took to preserve the access regime, it would be bizarre to convert traffic for which LECs currently *receive* originating access charges into traffic for which LECs would be required to *pay* reciprocal compensation.

- *Fifth*, this conclusion is still further reinforced by § 251(i), which says that nothing in § 251 shall be construed to limit or otherwise affect the Commission's authority under § 201. Extending § 251(b)(5) to interstate access traffic would be flatly inconsistent with that rule of construction, because it would subject that traffic to reciprocal compensation at rates set *by the states*, not by the Commission, thereby limiting the Commission's prior authority under § 201 – the very result that Congress barred.

Not only would reading § 251(b)(5) to embrace all traffic be legally unsustainable, but it also would be unwise as a policy matter because attempting to shoehorn *all* traffic into this

provision could severely limit the Commission's regulatory authority over intercarrier compensation generally and *interstate and Internet* traffic in particular. Under the 1996 Act, although the Commission has authority to establish "requisite pricing methodology, . . . the States . . . will apply those standards and implement that methodology, determining the concrete result in particular circumstances." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999). Because state commissions establish rates for reciprocal compensation (at least as applied to ILECs) pursuant to the standards of § 252(d)(2) and the Commission's regulations, embracing interstate traffic within § 251(b)(5) could give states substantial discretion to establish rates for traffic that has previously been within the Commission's exclusive control. Such disuniformity of treatment of interstate traffic would be unwise as a policy matter and, as explained above, could not have been within the contemplation of Congress in adopting § 251(b)(5). *See* 47 U.S.C. § 251(i) (preserving Commission authority under § 201).

Moreover, while the better reading of §§ 251(b)(5) and 252(d)(2) would allow the Commission to adopt bill-and-keep as a pricing standard for Internet-bound traffic given the characteristics of this traffic and the Commission's findings in the *ISP Remand Order*, *see* White Paper at 43-48, this issue remains open, and there remains some significant litigation risk with respect to the Commission's authority to impose that result. If the Commission were to attempt also to invoke this provision to impose bill-and-keep more broadly, to encompass all forms of traffic, including all interstate and intrastate exchange access traffic, it may well exceed the bounds of what can be sustained under the express terms of § 252(d)(2), particularly for intrastate access traffic. Accordingly, sweeping interstate and Internet traffic into § 251(b)(5) in the hope of imposing bill-and-keep treatment on intrastate access traffic would court grave risk: the Commission might cede substantial regulatory authority over interstate and Internet traffic to

the states, and actually limit rather than expand its authority to address inter-carrier compensation generally.

Finally, there is no merit to the suggestion that the D.C. Circuit intended to signal to the Commission that it *should* impose bill-and-keep for ISP-bound traffic under §§ 251(b)(5) and 252(d)(2). To be sure, the D.C. Circuit, recognizing the validity of the policy rationales supporting bill-and-keep treatment for ISP-bound traffic, noted that "there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (*perhaps* under §§ 251(b)(5) and 252(d)[2](B)(i))." *WorldCom*, 288 F.3d at 434 (emphasis added). But that statement was not intended to *restrict* the Commission's exercise of discretion – to the contrary, the court was emphasizing that, while it was disapproving the Commission's exclusive reliance on § 251(g), it did not intend to restrict the Commission's ability to reach the correct policy result for Internet-bound traffic. In suggesting that the Commission might reach that result under § 251(b)(5), the court did not intend to suggest that the Commission could not reach the result in other ways. To the contrary, the court took extraordinary pains to make clear that it was making *no* determinations beyond its conclusion that § 251(g) did not provide a basis for the rules adopted in the *ISP Remand Order*. Thus, the court explicitly "[did] not decide" whether ISP-bound calls constitute telephone exchange service or exchange access, whether those terms are exclusive, the scope of telecommunications covered by § 251(b)(5), or whether the Commission may adopt a bill-and-keep regime pursuant to that section. *Id.*[10] And the court went on to say that "these are

[10] The court made the same point at oral argument, rejecting any suggestion that the court had pre-judged any of the statutory issues presented. Transcript of Oral Argument at 10-11, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. argued Feb. 12, 2002) ("I'm at a loss as to how you can pass the straight face test with the notion that we've given some strong signal that this is a local call."); *id.* at 9 ("It's completely consistent that 251(g) can't be applied the way the Commission purported to apply it. And at the same time, these transactions are not governed by 251(b)(5)."); *id.* at 9-10 ("in a regular IXC phone call 251(b)(5) doesn't apply . . . . Everyone

only *samples* of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)." *Id.*

If anything, the *WorldCom* opinion indicates that the court was concerned that the Commission had read too much into *Bell Atlantic* and wanted to forestall the possibility that the Commission would read too much into *WorldCom*. It would be ironic if the Commission felt itself constrained by the court's statement – which appears to have been intended to give the Commission *greater* flexibility – particularly when the court could not have made clearer its intention to clear the decks to allow the Commission to resolve the treatment of ISP-bound traffic in a way that is both legally defensible and sound from a policy point of view.

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agrees that it doesn't apply to that"); *id.* at 37 ("251(b)(5) is bristling with ambiguity"); *see also* Transcript of Oral Argument at 14, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. argued Feb. 21, 2001) (*Bell Atlantic* held only that FCC's decision "w[as] not adequately supported").

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